

PITIFUL GIANTS: PRESIDENTS IN THEIR FINAL TERMS By Daniel P. Franklin. New York: Palgrave Macmillan, 2014. xii + 228 pp.

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All presidents, having served in our nation's most important political office, will face being a lame duck. In *Pitiful Giants: Presidents In Their Final Terms*, Daniel Franklin argues that the 22nd Amendment magnifies the problems of these *faltering giants* because term-limits create a "lengthier period of institutional decline." The lens then should be focused on *leaving presidents* rather than exclusively on incoming presidents who, as they lose some of their informal powers, should be more likely to turn to an expansive use of constitutional power.

In the Introduction, Franklin explains that "not all lame duck presidencies are the same." Some choose not to run for reelection, some lose their bid for reelection, and others are term-limited. Because of the 22nd Amendment, every president in their second term is a lame duck which means that reelection introduces an inevitable decline in power. The challenge lies in how they "work with the tools at their disposal." Franklin contends "the Constitution is the most likely source of power for leaving presidents," but the book does not focus exclusively on their use of constitutional powers. Instead, in each chapter he considers how leaving presidents use their powers to maximize their opportunities for policy gains.

As part of his investigation, Franklin provides some expectations of presidents when they are on their way out of office rather than on their way in. Lame duck presidents are likely to issue more vetoes and more will be overridden by Congress. They are more likely to issue executive orders and regulatory activity even though the former may be revoked or altered by the incoming president. Lame ducks should be more likely to use their pardon power to protect friends and legacy. We should see greater activity in foreign affairs. On the other hand, lame duck president should have less opportunity for actions that require congressional support including legislative leadership, appointments, treaties, and reauthorizations of presidential power. Presidents, then, must be creative in exercising influence in other ways. To illustrate the points he is trying to make, Franklin uses short case studies in shaded boxes within and at the end of each chapter.

In Chapter 1, Franklin considers leaving presidents and their relationship with Congress. He defines lame duck status as being the final congressional session or last two years in office, yet argues that second-term presidents could be considered lame ducks for their entire second term. To test this, he compares Congressional Quarterly (CQ) support scores for the first and second session of four two-term presidents (Eisenhower, Reagan, Clinton, and G.W. Bush) and finds that a difference between 57% and 51% respectively. Franklin acknowledges that the difficulty lies in trying to disentangle lame duck status, second term presidents (the 22nd Amendment), and divided government. In order to analyze for the effect of the 22nd Amendment on legislative leadership, Franklin uses the Legislative Productivity Index (LPI) and Major Legislative Index (MLI) constructed by Grant and Kelly (2008) for 1787-2004. Although these are not a substitute for presidential support scores, the LPI and MLI are lower during the administration of lame

duck presidents, although the results are not statistically significant. In *The President's Legislative Agenda, 1789-2002* (2012) Cohen uses a single data source to consider the view from the 1st to the 100th Congress.¹ In this broader view Cohen finds that lame duck presidents have lower support scores in the second Congress rather than the first Congress of their last term in office, arguing presidents benefit from Light's (1991, 1999) cycle of "increasing effectiveness" (2012, 235). Franklin finds that LPI and MLI are higher during periods of divided government which suggests to him that presidents can more easily overcome divided government than lame duck status. But the relationship of divided government and lame duck presidents may not be so easily disentangled. Cohen (2012, 246) finds that the interaction of lame duck presidents and divided government has a statistically significant negative influence on the enactment rate of the president's proposals, while the effect of lame duck status alone was not statistically significant.

Franklin argues that although legislative leadership may decline at the end of their tenure, presidents retain their constitutional power to veto legislation. Using the total number of vetoes he shows that lame duck presidents before and after the 22nd Amendment use vetoes more frequently and are more likely to have them overturned by Congress. In this chapter, Franklin concludes that "lame duck status is a serious drag on the ability of presidents to influence policymaking in Congress." This includes not only the ability to garner legislative support, but the constitutional power of the veto.

In Chapter 2, Franklin turns to leaving presidents and the administrative state, where presidents have "substantial resources at their disposal." He begins with a discussion of executive orders to show how presidents issue more in the last month of their term (Mayer 1999, 2001). Yet as he notes, the president's policy may not last since incoming presidents, especially of the opposite party, may revoke or change the executive order. He includes a section on *Delegated Powers* from Congress, possibly in an effort to distinguish them from constitutional powers. It would have been helpful if he had discussed the use of constitutional powers and delegated powers as the source of authority for executive orders (Warber 2006; Mayer 2001, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). He notes that President Clinton relied on delegated power under the Antiquities Act of 1906 to issue proclamations at the end of his first and second term in office which cannot be revoked by later presidents and can only be overturned by Congress.² Franklin argues that regulatory policy is more permanent since regulations are more difficult to reverse without reopening the rulemaking process (Kerwin and Furlong 2010). He could have linked the implementation of law through the regulatory process to the president's constitutional powers by discussing the Take Care Clause (Article II, § 3) and executive power vested in the president (Article II, § 1).

Franklin briefly discusses the problem of using personnel to "lock in the policies of the leaving administration" using case studies to illustrate the difficulties presidents face in making midnight appointments and the loss of talent to an incoming administration. Some data on the use of the

¹ Cohen (2012) considers the effect of lame duck status by on presidential success of their legislative proposals from the 1st to the 100th Congress using data from the Database of Historical Congressional Statistics (DHCS).

² President Clinton's Proclamation 6920 issued in 1996 raised the ire of members of the Utah delegation and resulted in legislative proposals and litigation (Belco and Rottinghaus 2009).

appointment power in the waning days of the presidency would have been enlightening. He ends the chapter with several case studies illustrating *Friendly and Hostile Takeovers* which augment a later chapter on the mechanics of transition.

In Chapter 3, Franklin focuses on leaving presidents and foreign policy. He argues that presidents have a lot more options in foreign policy than regulatory policy in the administrative state. Yet even in their quest for foreign policy, presidents are subject to the checks and balances of our constitutional structure. He contends that in foreign policy presidents may be more likely to use diplomacy, presidential travel, and speeches and more reluctant to exercise the use of force, treaties, and executive agreements which are subject to formal and informal checks on power. Travel abroad and speeches do not have the same long-term effect that a commitment to the use of force which may be troublesome to the next president. In his discussion of executive agreements, he finds there is a marked drop in the number of executive agreements submitted to Congress. As Krutz and Peake (2011, 42-43) explain, executive or international agreements are likely to require ex-ante and ex post congressional authorization which may explain the reluctance on the lame duck president's part to submit one to Congress in the waning days of his administration.

Franklin introduces the *Steel Seizure Case (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952))* to explain how presidents are "limited to largely symbolic actions in foreign policy." This would also have been a good time to consider the relationship of constitutional power and lame duck status on the Truman's defeat before the Supreme Court.

Chapter 4 is concerned with leaving presidents and partisan politics. He wonders whether leaving presidents are able to choose their successor, influence the campaign, and help with the election. As he shows, presidents are unable to handpick their successors and illustrates in two case studies that those who did lived to regret it. Importantly he covers the pardon power as one component of partisan politics and shows that presidents generally reserve the use of this constitutional power for the last three weeks in office.

Chapter 5 focuses on leaving presidents and the mechanics of transition. The ratification of the 20th Amendment shortened the transition, and he uses a case study of Truman to Eisenhower to illustrate the first modern transition that ended with hostility on both sides. The Presidential Transitions Act of 1963 and the subsequent amendments have helped to formalize the process, but as Franklin notes, it can't resolve the personality differences that remain.

In the Conclusion, Franklin addresses the public good and the limits of the leaving president. Hamstrung by politics, their legacy, and checks on power, presidential term limits might actually be good for government. The story of what happens after they leave office depends on the individual, but one thing modern presidents have in common is the presidential library which provides a permanent record of the successes and failures of the administration.

In sum, Daniel P. Franklin's *Pitiful Giants: Presidents in Their Final Terms* is recommended for those seeking an overview of the presidency from the perspective of those leaving rather than entering the office. The book is largely descriptive and it is easy to empathize with those pitiful giants who are valiantly working to lead our nation as their time in office wanes. Through the

richness of his writing and the inclusion of case studies, we observe the actions of leaving presidents dedicated to creating policy even as citizens and politicians are focused on the incoming president.

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